SYARIKAT MALTACO SDN. BHD.

v.

EOW TEH YU & ORS.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
[CIVIL APPEAL NO. 166 OF 1984]
18 JANUARY 1985

CIVIL PROCEDURE: *Appeal to High Court from decision of Assistant Director of Labour under Employment Act 1955 - Appeal made by way of originating motion - Whether filed out of time.*

The appellant appealed to the High Court on an originating motion to set aside the order of the Assistant Director of Labour. Counsel for the respondents raised a preliminary objection before the learned Judge contending that the Originating Motion was filed out of time and therefore the Court had no jurisdiction to hear the appeal. The issue was whether the appeal from the decision of the Assistant Director of Labour under the Employment Act should be filed within 14 days as stated in O. XXXIX r. 2(3) of the Subordinate Courts Rules 1980 as then applicable or within one month as stated in O. 55 r. 13 of the Rules of the High Court 1980.

Held:

[1] It is clearly the intention of the legislature that the procedure of appeal against the decision of the Director General under s. 69 of the Employment Act shall be procedure in a civil appeal from the Sessions Court as provided by O. 49 r. 2 of the Subordinate Court Rules 1980 and not O. 55 r. 13 of the Rules of the High Court 1980. *Yong Yoke Seng & Ors. v. Sungei Way Estate* [1966] 1 MLJ 175 not followed.

[2] Notice of preliminary objection was given one year before the application was heard by the learned Judge and yet the appellant's solicitors had not at any time made an application to extend time. This is not a case where the appellant should now be heard on an application for extension of time.

[Appeal dismissed with costs.]

Cases referred to:
Yong Yoke Sung & Ors. v. Sungei Way Estate [1966] 1 MLJ 175
Abaco Estate v. Selvarajah Thamboo [1985] CLJ (Rep) 362

Legislation referred to:
Employment Act 1955, s. 77
Employment Ordinance 1955, s. 77(2)
Rules Committee Ordinance, 1955, s. 4, (b)
Rules of the High Court 1980, O. 55 r. 13, O. 55 r. 13(1), (2)
Subordinate Court Rules Act 1955, ss. 4, 4(b), 69, 77
Subordinate Courts Rules 1980, O. 39 r. 2(3), O. 49 r. 2(3)

For the appellant - G. Ambiavagar; M/s. Ambiavagar & Co.
For the respondents - B. Lobo; M/s. Lobo & Associates

JUDGMENT

Hashim Yeop Sani SCJ:

The appellant was applicant before the learned Judge in an Originating Motion to set aside the order of the Assistant Director of Labour, Port Klang. The order sought to be set aside was that the applicant was to pay a sum of RM14,180.36 being overtime wages to the respondents. The order of the Assistant Director of Labour was made on 28 March 1981 and the Originating Motion was filed on 27 April 1981.

Mr. Lobo on behalf of the respondents raised a preliminary objection before the learned Judge contending that the Originating Motion was filed out of time and therefore the Court had no jurisdiction to hear the appeal. What became an issue was whether the appeal from the decision of the Assistant Director of Labour, Port Klang should be filed within 14 days as stated in O. XXXIX r. 2(3) of the Subordinate Courts Rules 1980 as then applicable or within one month as stated in O. 55 r. 13 of the Rules of the High Court, 1980.

For convenience the provisions of the law on procedure of appeal applicable on the date of the decision of the Assistant Director of Labour, Port Klang in this case are reproduced below:

Section 77 of the Employment Act 1955 (Revised 1981) provides as follows:

> 77(1) If any person whose financial interests are affected is dissatisfied with the decision or order of the Director General under s. 69 or s. 73 such person may appeal to the High Court.
>
> (2) **Subject to any rules made under s. 4 of the Subordinate Courts Rules Act 1955,** the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require.

Section 4 of the Subordinate Courts Rules Act 1955 (Revised 1971) provides as follows:

> 4. **Subject to any rules of Court made under the Courts of Judicature Act 1964** the Committee may make rules for the following purposes:
>
> (a) ...
>
> (b) for regulating and prescribing the procedure in proceedings by way of appeal from a Subordinate Court to the High Court, **the time within which any** such appeal may be brought, and the procedure in connection with the transfer of proceedings from any Subordinate Court to the High Court or from the High Court to a Subordinate Court.

On 1 April 1981 the Subordinate Courts Rules 1950 was repealed and replaced by the Subordinate Courts Rules 1980. Order 49 r. 2 (3) of the 1980 Rules like the 1950 Rules also provides that the notice of appeal shall be filed within 14 days from the date on which the decision was pronounced:

> 2.(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor, a certified copy of the judgment, or in case no written judgment has been delivered, of the grounds of decision."

Order 55 r. 13(1) and (2) of the High Court Rules 1980 provides as follows:

13. (1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence.

(2) **Unless otherwise provided by any written law,** such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date.

The appellant relied on *Yong Yoke Sung & Ors. v. Sungei Way Estate* [1966] 1 MLJ 175, a Federal Court decision. The appeal there was heard on 1 December 1965. In that case Mr. Peddie by way of preliminary objection argued as he had argued before the High Court that the appeal was never properly before the High Court because the appellants had not followed the procedure laid down by s. 77(2) of the Employment Ordinance, 1955, and O. 59 r. 13 of the High Court (now O. 55 r. 13) and that by reason thereof that Court had no jurisdiction to hear the appeal and consequently the appeal was not cognizable by the Court. Pike CJ in his judgment said at p. 177:

> It seems clear that the intention of the Legislature was that appeals from the commissioner should be regulated by rules of Court made under the Rule Committee Ordinance but that until such rules were made the procedure should be the same as for a civil appeal from a Sessions Court with such modifications as the circumstances may require. The addition of the words "with such modifications as the circumstances may require" seem to suggest that the Legislature recognised that the interim procedure which they were providing for would not be wholly appropriate and that it was only to ensure that there was no hiatus in the procedure for such appeals that the provisions was made.
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> ...
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> While it is clear that until Legal Notice (N.S.) 120 of 1957 O. 59 r. 13 was made the procedure in such appeals would, with such modifications as the circumstances may have required, have been the procedure for civil appeals from a Sessions Court. Since the coming into force in 1957 of O. 59 r. 13 the procedure is in our view clearly that laid down in that rule, namely, that such an appeal must be brought by way of motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence. It follows therefore that the matter was not properly before the High Court but as in the view of this Court the success of the argument before the High Court would have resulted in leave being given for the proceedings to be brought before the Court in proper form the Court decided to hear the appeal on the merits.

The decision of the learned Judge in the instant case (Harun J) found support in two previous decisions of Wan Hamzah J in two similar cases on the same question which decisions were unfortunately not reported. The two cases are *Krishnasamy s/o Vythilingam & 2 Ors. v. New Selangor Plantations Sdn. Bhd.* unreported - K. Lumpur Originating Motion A35 of 1982 and *Abaco Estate v. Selvarajah a/l Thamboo* unreported - K. Lumpur Civil Appeal No. 22 of 1983 (**Editor's Note:** *Abaco Estate* case has since been reported at [1985] CLJ (Rep) 362). In both these cases Wan Hamzah J ruled that the procedure to be adopted in an appeal under s. 77 of the Employment Act is the procedure laid down in the Subordinate Courts Rules 1980.

Wan Hamzah J crystallised his thinking in the second case of *Abaco Estate* and in that case he considered *Yong Yoke Sung & Ors.* and in effect ruled that the decision should be understood in the context of the time it was made. We think that this is a correct approach to and evaluation of the decision having regard to the state of the law today. For convenience we reproduce that part of the judgment of Wan Hamzah J:

The decision of the Federal Court in that case was made when the Rule Committee Ordinance 1955 in its old form was in force. At that time the Rules of the Supreme Court 1957 were also in force and had not been replaced by the Rules of the High Court 1980. As pointed out by Pike CJ in that case, s. 77(2) of the Employment Ordinance 1955 at that time should be read as follows:

> Subject to any rules made under s. 4 of the Rule Committee Ordinance 1955, the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require.

In his judgment Pike CJ stated-

> Section 4 of the Rule Committee Ordinance 1948 has been repealed and replaced by s. 4 of the Rule Committee Ordinance 1955. In each section there was provision for the making of rules for 'regulating and prescribing the procedure on appeals from any Court or person(s) to the Court of Appeal or the High Court'...

Pike CJ was referring to s. 4(b) of the Rule Committee Ordinance 1955, the relevant parts of which read as follows:

> 4. It shall be the duty of the Rule Committee from time to time and as occasion may require to make rules for the following purposes-
>
> (a) ...
>
> (b) for regulating and prescribing the procedure in proceedings by way of appeal from any Court or persons to the Court of Appeal or the High Court, the time within which any such appeal may be brought, and

At that time s. 4 of the Rule Committee Ordinance 1955 provided for the function of one and the same Rule Committee for making rules for regulating the procedure and the practice to be followed in the High Court and in Subordinate Courts respectively. It also provided for the function of the same Rule Committee to make rules for prescribing the procedure by way of appeal to the High Court not only from the decisions of Subordinate Courts but also from the decisions of persons like the decision of Penolong Pengarah Buruh in the present case. Thus the Rules of the Supreme Court 1957 were made by that Rule Committee (established under s. 3) pursuant to the powers conferred by s. 4 of the Rule Committee ordinance 1955. Therefore the Rules of the Supreme Court 1957 were rules referred to in the opening words of s. 77(2) of the Employment Ordinance, i.e., the words "Subject to any rules made under s. 4 of the Rule Committee Ordinance 1955". I believe that if they were not so, the Federal Court would not have held that O. 59 r. 13 of the Rules of the Supreme Court 1957 applied in that case. That this was so is shown by the fact that Pike CJ took pains to explain that the reference to s. 4 of the Rule Committee Ordinance 1948 contained in the opening words of s. 77(2) of the Employment Ordinance must be construed as a reference to s. 4 of the Rule Committee Ordinance 1955. Pike CJ also stressed that the opening words of s. 77(2) were not mere surplusage, on the ground that a perfectly sensible meaning could be given to them.

It would seem that Harun J also recognised the desirability of understanding *Yong Yoke Sung & Ors.* in the context of the time when the judgment was written when he said at p. 7 of his judgment in the instant case:

> By the time the Federal Court heard that case, the Rules of the Supreme Court 1957 had come into force which is the reason why it held that RSC O. 59 r. 13 applied in that case. On a proper sequence of legislation therefore, the interim procedure of applying the procedure of appeals from the Sessions Court to the High Court in s. 77(2) of the Employment Ordinance ceased to apply on 1 April 1958 (the date when the Rules of the Supreme Court 1957 came into force).

In our opinion the words "subject to any rules made under s. 4 of the Subordinate Courts Rules Act 1955" appearing at the commencement of s. 77(2) of the Employment Act are not surplusage. If it was not clear before it is clear now that with those words the intention of the Legislature is to abide by the procedure laid down by the Subordinate Courts Rules.

The direction given in s. 77(2) was that the **procedure** in an appeal to the High Court shall be the procedure in a civil appeal from the Sessions Court. Having regard to s. 4(b) of the Subordinate Courts Rules Act 1955 the time within which any such appeal may be brought is clearly part of the procedure. Therefore the "modifications" referred to in s. 77(2) are only modifications as to form and not as to time. We also do not think that the words "subject to any rules of Court made under the Courts of Judicature Act 1964" appearing at the commencement of s. 4 of the Subordinate Courts Rules Act have any effect on O. 49 r. 2(3) of the Subordinate Courts Rules 1980 because of the clear words "unless otherwise provided by any written law" appearing at the commencement of O. 55 r. 13(c) of the High Court Rules 1980.

We are therefore satisfied that it is clearly the intention of the Legislature that the procedure of appeal against the decision of the Director General under s. 69 of the Act shall be the procedure in a civil appeal from the Sessions Court as provided by O. 49 r. 2 of the Subordinate Courts Rules 1980 and not O. 55 r. 13 of the High Court Rules 1980.

Miss Ambiavagar for the appellant stated that she had made a verbal application to the learned Judge for extension of time if the Judge held that she was out of time but the Judge refused to entertain her application. This fact was however not recorded anywhere in the judgment. Mr. Lobo on the other hand drew our attention to a copy of a letter from the respondents' solicitors to the appellant's solicitors dated 20 May 1983 (encl. (89) in Bundle of Appeal) giving notice of the preliminary objection and that this notice was in fact given one year before the application was heard by Harun J and yet Miss Ambiavagar had not any time made any formal application for leave to extend time.

We are of the view that this is not a case where the appellant should now be heard on an application for extension of time.

The appeal is accordingly dismissed with costs.

Also found at [1985] 2 CLJ 120